86-555

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No. 86-_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

INTERNATIONAL FRUIT PRODUCTS COMPANY, INC., et al.,

Petitioners,

vs.

JAMES BRYANT, et al.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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QUESTION PRESENTED

May an employer validly amend its defined benefit pension plan to provide for recovery of surplus assets, when the plan prohibits amendments allowing use of the Trust Estate for any purpose other than the exclusive benefit of participants?

PARTIES

The caption of this case does not reflect all parties to this action. Irwin Unger and Marie Spicker Dopp, Trustees, are also petitioners. In addition to respondent Bryant, Major Bonner, Priscilla Carlisle, Fred Clemons, Audrey Foerstel, Elie Hales, Dwight Jackson, Louise Mayfield, Paul Mitchem, Eddie Moses, Beverly Smith, Dennis Smith, Isabella Starr, Emmel Wilson, and Thomas Williams are respondents.

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Petitioners, International Fruit Products Co., Inc., et al., defendants below, pray that a writ of certiorari issue to review the decision and order of the United States Court of Appeals for the Sixth Circuit reversing and remanding this case to the United States District Court for the Southern District of Ohio with instructions to fashion an equitable allocation of excess funds.

OPINIONS BELOW

The opinion of the court of appeals is reported at 793 F.2d 118 (6th Cir. 1986) and is printed in Appendix A at 1a.[1] The opinion of the district court is reported at 640 F. Supp. 890 (S.D. Ohio 1985) and is printed in Appendix A at 14a.

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[1] "App. A" and "App. B" refer to the appendices to this petition for certiorari. Appendix A contains the judgment, opinion, and the order denying

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered and filed on June 12, 1986. (App. A at 22a). A timely Petition for Rehearing was denied on July 10, 1986. (App. A at 24a). The 90th day after the denial of the Petition for Rehearing is Wednesday, October 8, 1986. This petition was filed on or before that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves allegations of violations of the Employee Retirement Income Security Act of 1974 (ERISA), as amended, 29 U.S.C. §§ 1001 et seq., the pertinent provisions of which are set forth in Appendix B. Also involved are certain provisions of the Internal Revenue Code and IRC regulations, which also are included in Appendix B.

STATEMENT OF THE CASE

This petition concerns the ability of an employer to amend its pension plan to recover, after all defined benefits have been fully satisfied, surplus assets arising solely from employer contributions. The appellate court decision at issue forbids such amendments, creating windfalls for employees and discouraging employers from ensuring full funding of their pension plans.

From 1944 until its cessation of operations in 1982, petitioner International Fruit Products Company, Inc. (hereinafter referred to as the Employer) maintained a pension plan for its employees. The Plan was a defined benefit

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rehearing of the court of appeals and the opinion and order of the district court. Appendix B contains the relevant provisions of the Employee Retirement Income Security Act, the Internal Revenue Code, and regulations promulgated thereunder.

plan funded solely by employer contributions. No contributions have ever been made by any employee.

Under a defined benefit plan, a participant is entitled to receive, upon retirement, the specific benefits provided by the plan's formula.[2] The employer's obligation is to make only those contributions sufficient to fund the defined benefits to which each employee is entitled.

In order to be a "qualified" pension plan, both under the Internal Revenue Code of 1954 and now under ERISA, a pension plan must specifically state its assets will not be used for purposes other than the exclusive benefit of employees participating in the plan. *See* 26 U.S.C. § 401(a)(2) and 29 U.S.C. § 1103(c)(1). In 1959, petitioner's pension plan was rewritten to include this "exclusive benefit" language.

This language appeared in two sections. Section 5.3 of the 1959 plan stated that

> In no event and under no circumstances shall any contributions to this Trust by the Employer, nor any of the Trust estate or the income therefrom, revert to or be repaid to the Employer; and all amounts paid by the Employer to the Trustee shall be used and applied for the sole and exclusive benefit of the participants under this Trust or their beneficiaries or estates.

In Section 13.1, however, the Employer expressly reserved the right to amend the Plan, provided

> that no such amendment shall cause or permit any part of the Trust Estate to revert to or be repaid to the Employer or be diverted to any purpose other than the exclusive benefit of the participants or their beneficiaries or estates.

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[2] A defined benefit plan may be contrasted with a defined contribution plan, in which the employer's obligation is to make a specific contribution on behalf of each participant. *See, e.g.*, 29 U.S.C. § 1002(34) and (35).

The 1959 plan specifically set forth the Employer's intent to create a "qualified plan" within the meaning of Section 401(a) of the Internal Revenue Code.

ERISA was enacted in 1974 and also provides that assets of an employee benefit plan are to be held for the exclusive benefit of the plan participants, 29 U.S.C. § 1103(c)(1). ERISA, however, codified an express exception to this rule. Under Section 4044(d)(1) of ERISA, 29 U.S.C. § 1344(d)(1),

> (1) Any residual assets of a single-employer plan may be distributed to the employer if
>
> (A) All liabilities of the plan to participants and their beneficiaries have been satisfied,
>
> (B) The distribution does not contravene any provision of law, and
>
> (C) The plan provides for such distribution in these circumstances.

ERISA's provision permitting reversion of surplus assets was consistent with pre-ERISA Internal Revenue Code regulations, which recognized a reversion of excess assets to an employer, after all defined benefits had been satisfied, was not a violation of the "exclusive benefit" rule. Treas. Reg. 1.401-2(b)(1).

After ERISA was enacted, petitioner in 1976 amended and restated its Plan. Sections 5.3 and 13.1 of the 1959 plan were eliminated and were replaced by Sections 8.2 and 11.1, each of which contained "exclusive benefit" language prohibiting the use or diversion of plan funds for any purpose other than the exclusive benefit of participants.

In 1982, petitioner ceased operations and, accordingly, terminated its pension plan. Shortly before termination, the plan was amended to expressly set forth the Employer's right to recapture any surplus assets arising from actuarial error, *i.e.*, error occurring from incorrect actuarial predictions of

the funds needed to satisfy the plan's requirements.[3] After all defined benefits had been fully paid to the employees, a surplus of approximately $139,000 existed. Consistent with the plan provisions at the time of termination, this surplus reverted to the Employer.

Sixteen of the 64 former employees filed suit, claiming the reversion of surplus assets violated ERISA.[4] The employees acknowledged the first two requirements of ERISA Section 4044(d) had been satisfied; they acknowledged they had received *all defined benefits* to which they were entitled and also recognized the distribution had violated no law. They claimed, however, the third prong of Section 4044(d) had not been met. Relying on Sections 5.3 and 13.1 of the *1959* plan, provisions that had been removed from the plan when it was restated in 1976, they claimed the 1959 plan prohibited any amendment that would permit recapture and thus could never validly have been amended to provide for a reversion of surplus assets. Hence, they contended, the plan did not provide for a distribution to the Employer and accordingly the requisites of Section 1344(d) had not been satisfied.

The district court disagreed and granted summary judgment in favor of petitioners. Relying on directly applicable precedent from other circuits, it held the 1959 plan language relied upon by respondents served only to prohibit a reversion of those assets necessary to fund defined benefits and was never intended to prohibit a reversion of surplus assets. Any other reading, recognized the court, would provide employees with a "windfall" and "would undermine the policies behind the enactment of ERISA." (App. A at 19a).

On appeal, the Sixth Circuit reversed. Relying on the "ex-

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[3] Prior to this amendment, the plan had never had any provision for an allocation of excess assets.

[4] Plaintiffs also raised a variety of state law claims that were dismissed by the district court, the dismissal of which was not urged as error on appeal.

clusive benefit" language in Section 5.3 of the 1959 plan and ignoring the enactment of ERISA, the appeals court (despite a vigorous dissent) held the plan could not be amended to allow the employer to recoup its own excess contributions. It thus remanded the case to the district court to devise a procedure for distribution of the surplus assets.

REASONS FOR GRANTING THE WRIT

This case presents an important question on employers' rights under ERISA to recapture surplus assets. At issue is the right of an employer, who in an excess of caution has overfunded its pension plan, to recapture any surplus assets remaining after all defined benefits have been fully satisfied. The court of appeals' decision prohibiting reversion conflicts with decisions of the Second, Third, and D.C. Circuits, all of which hold that "exclusive benefit" language virtually identical to that at issue here does not prohibit an amendment authorizing a reversion of excess funds.

The decision below also is contrary to the policies of ERISA, which is designed to ensure full funding of employee benefit plans. By forbidding recapture of excess assets, the Sixth Circuit's decision encourages employers to make minimal contributions so as to avoid development of a surplus, a result at odds with the goals of ERISA.

Approximately 68% of today's pension plans are defined benefit plans. Additionally, more than five billion dollars in surplus assets has been removed or is targeted for removal from these plans. Accordingly, the economic significance of the decision below, a decision that precludes employers from amending their plans to allow reversion of surplus funds, is substantial.

This Court should grant certiorari to clarify that under ERISA, a pension plan's provisions prohibiting amendments allowing reversion of trust funds extends only to those assets necessary to fund defined benefits.

I. The Decision Below Conflicts With Decisions Of The Second, Third, and D.C. Circuits By Restrictively Interpreting "Exclusive Benefit" Language.

Prior to the appeals court decision below, several circuits had considered the question of an employer's right to amend its defined benefit pension plan to allow recapture of surplus assets, in the face of "exclusive benefit" language appearing to prohibit such amendments. Each court had concluded such amendments were lawful.

Both ERISA and the Internal Revenue Code require a pension plan to state its assets will not be diverted from the exclusive benefit of participants. I.R.C. Section 401(a)(2), 26 U.S.C. § 401(a)(2); ERISA Section 403(c)(1), 29 U.S.C. § 1103(c)(1). Consequently, "exclusive benefit" language long has been a standard component of qualified pension plans, mandated by these IRS requirements.

ERISA, however, specifically provides that upon plan termination, residual assets may be distributed to the employer if three requirements are satisfied. First, all liabilities of the plan to participants and their beneficiaries must have been satisfied. Second, the distribution must contravene no law. And third, the plan must provide for such distribution. ERISA made clear what Internal Revenue Code regulations long had approved: a reversion to an employer of surplus assets does not contravene the exclusive benefit rule. Treas. Reg. 1.401-2(b)(1).

Frequently, as here and as in the cases decided by other circuits, a plan is amended shortly before termination to spell out the employer's right to recapture surplus assets. And such amendments frequently occur in the face of "exclusive benefit language" that often appears to prohibit an amendment allowing reversion to the employer.

Courts asked to construe such language thus must decide how strictly such prohibitions may be construed. Contrary to the appeals court decision below, the Second, Third, and D.C. Circuits have held such restrictions on amendment serve

only to prohibit violations of the exclusive benefit rule. And because a reversion of surplus assets, occurring upon plan termination and after all defined benefits to participants have been fully satisfied, is an express exception to the exclusive benefit rule, amendments providing for recapture have been permitted.

In the seminal case of *In re C.D. Moyer Company Pension Trust*, 441 F. Supp. 1128 (E.D. Pa. 1977), *aff'd without opinion*, 582 F.2d 1273 (3d Cir. 1978), the original benefit plan in question contained a provision virtually identical to that at issue here, prohibiting any amendment that would permit a reversion or use of the trust corpus or income for any purpose other than for the exclusive benefit of the participants. In interpreting this provision, the court held the language did not preclude an amendment allowing reversion, finding that "trust income or corpus" should be interpreted to include *only* so much of the funds necessary to pay the defined benefits. As the court recognized in so holding,

> [T]his result is consistent with the policies underlying the enactment of ERISA. Employers will continue to fund their plans under ERISA guidelines but will not be penalized for overfunding in 'an abundance of caution' or as a result of a miscalculation on the part of an actuary. Thus, employees will continue to be protected to the extent of their specific benefits but will not receive any windfalls due to the employer's mistake in predicting the amount necessary to keep the Plan on a sound financial basis.

441 F. Supp. at 1132-33.

Similarly, in *Pollock* v. *Castrovinci*, 476 F. Supp. 606 (S.D.N.Y. 1979), *aff'd without opinion*, 622 F.2d 575 (2d Cir. 1980), the plan provided "the employer shall have power to amend the terms of this Plan in any way provided that no such amendment shall enable it to recover or divert from the exclusive benefit of the Participants the fund already deposited in the Trust." The plan thereafter was amended to

permit reversion of surplus funds. The court recognized that in the context of a defined benefit plan, "it is apparent that the provision was intended only to prohibit amendments reducing benefits to the extent funded." 476 F. Supp. at 617. The amendment, accordingly, was deemed proper.

Pollock and *C.D. Moyer* were followed by *Washington-Baltimore Newspaper Guild* v. *Washington Star Co.*, 555 F. Supp. 257 (D.D.C. 1983), *aff'd without opinion*, 729 F.2d 863 (D.C. Cir. 1984). There, the plan provided "that no amendment shall divert the Trust Fund as then constituted, nor any part thereof, to a purpose other than for the exclusive benefit of employees covered by the Plan or their beneficiaries." The court upheld a pre-termination amendment permitting a reversion of surplus assets to the employer. In so holding, the court recognized that, "as a defined benefit plan, the participants, in the absence of an agreement to the contrary, have no right to a windfall resulting from an employer's overly generous contributions to the plan." 555 F. Supp. at 261.

The Sixth Circuit's decision sharply departs from these cases. The appeals court found the 1959 plan's prohibition against a reversion of contributions to the employer could *never* be amended to permit a recapture of surplus assets. This result was reached despite a prohibition against amendments the court conceded was "similar" to those under scrutiny in *C.D. Moyer*, *Pollock*, and *Washington-Star* and despite the enactment of ERISA which specifically authorized such reversions.

The appeals court below tried to distinguish these cases, however, by relying on Section 5.3 of the 1959 plan, which it contended was more restrictive than the anti-amendment language in either Section 13.1 of the 1959 plan or the language at issue in *Moyer*, *Pollock*, and *Washington-Star*. What the court failed to recognize, however, is that the plan reserved in the employer at *all times* the right to amend the plan, subject to the anti-amendment language in Section 13.1. Thus, as *Moyer*, *Pollock* and *Washington-Star* correctly

recognized, it is the "anti-amendment" language that is the true focus in a plan amendment case. If the plan allows an amendment that would provide for the recapture of surplus, the amendment is proper.

As held by the Second, Third and D.C. Circuits, the anti-amendment language present here should be construed only to forbid an amendment permitting diversion of those funds needed to pay defined benefits. By construing this plan to prohibit an amendment allowing for recapture of surplus assets, the appeals court reached a result in square conflict with those of all its sister circuits who have faced this issue.

It is a result, moreover, that revives for all employers the spectre of language long ago reformulated to meet the requirements of ERISA. Under the Sixth Circuit's analysis, pre-ERISA plan language removed years before a Plan is terminated can be invoked to prohibit amendments ERISA expressly permits. This holding injects into plan administration an intolerable uncertainty. By permitting Plan language from years past to alter the content of present or future plans, despite the presence of a provision permitting amendment, the governing terms of any employee benefit plan have been placed in serious question and uncertainty by the Sixth Circuit.

II. The Decision Of The Court Below Is Inimical To The Policies Of ERISA And Would Discourage Responsible Funding Of Defined Benefit Plans.

The appeals court decision forbids this employer from recovering, after all defined benefits to participants had been *fully* satisfied, the excess money it contributed to its pension plan. As a defined benefit plan, the plan promised participants they would receive a *specified* amount; it is uncontroverted those benefits were *fully paid*. The appeals court's decision now confers on the participants something more: a windfall resulting from an over cautious actuarial estimation of the monies needed to fund their defined benefits.

The impact of this decision reaches well beyond this employer. As of 1980, approximately 68% of pension plans were defined benefit plans. CCH [1983-85 Transfer Binder] Pension Plan Guide ¶ 25,579 (1985).[5] Between 1979 and 1985, moreover, nearly 600 companies terminated their plans, recovering more than five billion dollars in surplus and affecting almost 700,000 participating workers and retirees. The number of terminations is expected to increase, given the strong market of recent years that has caused plan overfunding to develop. *Id.* at ¶ 25,655.

Under ERISA, an employer's obligation is to contribute to a defined benefit pension plan *only* the amount of money necessary to fund the defined benefits. A surplus thus arises whenever those contributions exceed the amount actually needed to satisfy plan liabilities.

This surplus can (and frequently does) occur, as here, on the basis of actuarial error. Actuaries are required by law only to give their "best estimate" of the level of contributions needed to fund a plan, based on assumptions concerning such factors as interest rates, employees' anticipated years of service, and life expectancies. See 26 U.S.C. § 412(c)(3). The employer then contributes the amounts its actuaries advise it are necessary to fund the plan. When the actuarial predictions, upon plan termination, prove to have been erroneous, a surplus results.[6]

ERISA and the Internal Revenue Code specifically contemplate the reversion to the employer of any suplus con-

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[5] In 1950, 90% of plans were defined benefit plans. The decline in this form of plan has been blamed on "the lack of a clear, comprehensive policy" regarding defined benefit plans. *Id.*

[6] The General Accounting Office recently conducted a survey of the 712 defined benefit plans that had either terminated or had announced an intention to terminate from January 1, 1980, through June 30, 1985. According to the GAO report, "excess assets at termination resulted from a higher rate of investment return than assumed in determining contribution requirements." 6 CCH Pension Plan Guide ¶ 25,776 (June 13, 1986).

tributions. Each recognizes a reversion to an employer of money it contributed over and above those assets actually needed to fund the defined benefits is consistent with the exclusive benefit rule.[7]

Left uncorrected, the appeals court's decision runs counter to ERISA's policy of ensuring fiscal soundness of employee benefit plans. A fundamental legislative purpose of ERISA was to assure that plan participants 'actually receive benefits and do not lose benefits as a result of unduly restrictive forfeiture provisions or failure of the pension plan to retain sufficient funds to meet its obligations." 1974 U.S. Code Cong. & Ad. News 4676-77. Thus Congress recognized that to foreclose recapture of surplus assets would ultimately be to place in jeopardy the soundness of defined benefit plans.

If an employer, because of some form of "exclusive benefit" language in a long extinct version of its plan, may not now amend its current plan to provide for a reversion of surplus assets, significant motivation exists to prevent the development of any surplus or to reduce any surplus that now exists by ceasing contributions. Those employers who have made contributions "in an abundance of caution" to guarantee that plentiful funds will exist to satisfy their employee's defined benefits have now had their concerns for sufficiency turned against them.[8] In addition, employers now have every reason to seek valuations that will minimize contribution levels or to

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[7] To ensure, moreover, that any recapture does not affect the defined benefits, a plan's termination must be approved by the Pension Benefit Guaranty Corporation and by the Internal Revenue Service. Here, it is undisputed the PBGC and IRS issued all requisite approvals in connection with the Plan's termination.

[8] In its opinion, the Sixth Circuit raised the suggestion that a reversion would result in a windfall to the employer, reasoning the contributions were deductible and the reversion was not taxable. This incorrect assertion had no basis in the record, nor in the law. As pointed out to the court on rehearing, the reversion was taxable under the tax benefit rule, 26 U.S.C. § 61(a), and this employer in fact reported the reversion as taxable income.

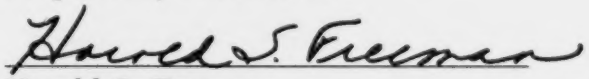
reduce any margin of comfort or security their plans presently enjoy.

The decision of the appellate court below thus is wrong not only as a matter of contract law but as a matter of policy. It allows employees to enjoy windfalls they were never promised. It penalizes those employers who have cautiously insured that plentiful assets will exist to fund their plans. And it provides strong incentive to employers to minimize contributions, placing future payment of defined benefits at risk. Such an unfair result is neither mandated by nor compatible with ERISA.

CONCLUSION

The appellate court's opinion below conflicts with those of other circuits having occasion to consider the appropriateness of an amendment permitting an employer to recapture the surplus funds it contributed to a defined benefit pension plan. The court's improper and restrictive interpretation of "exclusive benefit" language reaches a result at odds with prior interpretations of ERISA and unfairly penalizes this employer, along with all other employers whose plans at some time have contained "exclusive benefit" language. The effects of its decision, moreover, have far reaching implications for employers and their employees by encouraging a lower level of contributions to defined benefit plans. For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX A

Nos. 85-3183; 85-3229

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JAMES BRYANT, et al.,
Plaintiffs-Appellants,
v.
INTERNATIONAL FRUIT PRODUCTS COMPANY, INC., et al.,
Defendants-Appellees

ON APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed June 12, 1986

Before: LIVELY, Chief Judge; MERRITT and WELLFORD, Circuit Judges.

LIVELY, Chief Judge, delivered the opinion of the court in which MERRITT, Circuit Judge, joined. WELLFORD, Circuit Judge, (pp. 12-15) delivered a separate dissenting opinion.

LIVELY, Chief Judge. This action was brought under the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001 *et seq.* (1982). The question for decision is whether the employer effectively amended a pension plan to provide that upon termination, any excess funds in the trust after payment of defined benefits to participants would revert to the employer. The district court determined that the employer had lawfully amended the plan, and entered summary judgment for the defendants. *Bryant* v. *International Fruit Products Co., Inc.*, 604 F. Supp. 890 (S.D. Ohio 1985).

I.

A.

The plaintiffs are all former employees of the defendant International Fruit Products Company, Inc. (the company). The defendants are the company and the trustees of a pension fund. The termination of the fund by the company precipitated this litigation.

The company created a pension plan for its employees in 1944. In 1959 the company rewrote the original trust agreement that contained the terms of the plan. The 1959 agreement created "The International Fruit Products Company Pension Trust." Under the 1959 agreement all contributions to the pension trust were to be made by the company. The agreement established a defined benefit plan. Under such a plan, the employer is required to make sufficient contributions to provide specified pensions to participating employees. Under a defined benefit plan the employer does not make contributions to an individual account for each participant; rather, the contributions are made to an account or several accounts which provide funding for the pensions of all the participants. The 1959 agreement created a "qualified pension plan" under the Revenue Act of 1954. One of the requirements of a qualifed plan is that no part of the corpus or income of a pension trust be "used for, or diverted to, purposes other than for the exclusive benefit of [the employer's] employees or their beneficiaries." 26 U.S.C. § 401(a)(2).

The 1959 agreement contained two provisions dealing with diversion of funds from the pension trust:

> Section 5.3 In no event and under no circumstances shall any contributions to this Trust by the Employer, nor any of the Trust Estate or the income therefrom, revert to or be repaid to the Employer; and all amounts paid by the Employer to the Trustees shall be used and applied for the sole and exclusive benefit of the participants under this Trust or their beneficiaries or estates.
>
> * * *

> Section 13.1 The Employer expressly reserves the right to amend this Trust from time to time, either on the motion of the Trustees, or upon the Employer's own initiative; provided, however, that no such amendment shall cause or permit any part of the Trust Estate to revert to or be repaid to the Employer or be diverted to any purpose other than the exclusive benefit of the participants or their beneficiaries or estates. . . .

The agreement reserved to the company the right to terminate the trust, and provided that the interest of each participant would become completely vested upon termination. The agreement stated that the trust was created with the intent that it qualify under section 401(a) of the Internal Revenue Code.

B.

Following the enactment of ERISA the company "amend[ed] and restate[d]" the pension plan in its entirety by a document dated April 27, 1976 (the 1976 plan). The provisions of section 5.3 and 13.1 of the 1959 agreement were omitted. The limitation on diversion was restated in two sections:

> Section 8.2 It shall be impossible at any time prior to the complete satisfaction of all liabilities with respect to Members and their Beneficiaries under this plan for any part of the Trust Fund to be used for, or diverted to, purposes other than the exclusive benefit of the Members and their Beneficiaries.
>
> * * *
>
> Section 11.1 The Employer shall have the right to alter or amend this Plan at any time in whole or in part, provided that no amendment shall authorize or permit any part of the Trust Fund to be used for or diverted to any purpose other than the exclusive benefit of the Members or their Beneficiaries, and provided further that no amendment shall serve to deprive any Member

> or Beneficiary of a deceased Member of any of the values to which he is entitled under this Plan with respect to contributions previously made.

The company's right to terminate the plan was restated in section 11.2, and for the first time reference was made to allocation of assets:

> The rights of all Members to benefits accrued to the date of such termination to the extent funded, shall be fully vested and non-forfeitable and the assets of the Trust Fund shall be allocated among the Members and their beneficiaries in accordance with Section 4044(a) of the Act as now in effect or hereafter amended and administered and distributed at such time or times as is determined by the Trustees.

Section 4044(a) of the Act (ERISA), 29 U.S.C. § 1344(a), referred to in the newly-added language, sets the order of priority of participants and beneficiaries upon termination of a single-employer defined benefit plan.

C.

On May 25, 1982 the company amended the plan again to add a new provision to section 11.2:

> After fulfillment of all obligations provided for in this Section 11.2, any portion of the Trust Fund remaining as a result of actuarial error shall be returned to the Employer.

This provision for reversion of excess funds to the company also derived from ERISA. Section 4044(d)(1) of ERISA, 29 U.S.C. § 1344(d)(1), deals with the distribution of "residual" assets:

> (d) Distribution of residual assets; remaining assets
>
> (1) Any residual assets of a single-employer plan may be distributed to the employer if—

(A) all liabilities of the plan to participants and their beneficiaries have been satisfied,

(B) the distribution does not contravene any provision of law, and

(C) the plan provides for such a distribution in these circumstances.

The reference to "actuarial error" had its genesis in a regulation of the Internal Revenue Service permitting a qualified plan to contain a provision for recovery of a surplus caused by such error. 26 C.F.R. § 1.401-2(b)(1).

The resolution of the company's board of directors which added the reversion provision also terminated the pension plan as of July 1, 1982. Upon termination, $61,000 was distributed to participants and the excess of $139,000 was returned to the company.

II.

The district court found that the three requirements of ERISA section 4044(d) for distribution of excess funds to the company had been satisfied. The plaintiffs conceded that the first two were met—all liabilities to participants and their beneficiaries had been paid in full, and the distribution did not contravene any provision of law. However, relying on the absolute prohibition against such a distribution in section 5.3 of the 1959 agreement, and the limitation on the right to amend in section 13.1, the plaintiffs argued that the third requirement of section 4044(d) was not met; *i.e.*, the plan did not provide for such a distribution to the company.

The district court agreed with the company that the restrictive language in the 1959 agreement was intended to meet the "exclusive benefit" requirement for qualification of the plan under section 401(a) of the Internal Revenue Code. The court also agreed with the company that this was "standard pension language mandated by the Internal Revenue Code." 604 F. Supp. at 892. It was significant, in the view of the district court, that "until May 1982, the Plan had no provision for dealing with any post-termination surplus." *Id.* at 891. The

district court held that the "exclusivity language of the sections relied upon by plaintiffs must be read in light of the ERISA provisions that mandated it," and concluded that "[t]hose provisions [sections 5.3 and 13.1 of the 1959 plan] have never prohibited reversion of actuarial error to the employer. . . ." *Id.* at 892. On this basis the district court determined that neither the original nor the amended language barred reversion of the surplus funds to the company.

The district court relied principally on two district court decisions involving the right of employers to recapture excess funds in pension trusts. *In re C. D. Moyer Co. Pension Trust*, 441 F. Supp. 1128 (E.D. Pa. 1977), *aff'd without opinion*, 582 F.2d 1273 (3d Cir. 1978), concerned a plan that originally limited the employer's right to amend the agreement as follows:

> It shall, however, at all times be impossible, if any alteration, amendment or revocation be made pursuant to this provision, for any of the trust corpus or income to be diverted to or revert to either of the employers or to be used for any purpose other than the exclusive benefit of the participants or their beneficiaries.

The plan was amended after enactment of ERISA to provide for return of assets to the employer that resulted from actuarial errors. The court found that at the time the fund was created "trust corpus or income" included "only so much of the funds as were necessary to insure full payment of the plan's obligations to the participants." 441 F. Supp. at 1132. The *Moyer* court found that the parties had not contemplated that there would be a surplus, and that to award the surplus to participants who had already received their prescribed benefits in full would bestow an unwarranted windfall. As a matter of policy, the court felt that employees would be better protected by a rule that did not penalize employers for overfunding pension trusts.

The court in *Washington-Baltimore Newspaper Guild* v. *Washington Star Co.*, 555 F. Supp. 257 (D.D.C. 1983), *aff'd*

without opinion, 729 F.2d 863 (D.C. Cir. 1984), reached the same result as in *Moyer*. Prior to 1976 the trust agreement involved in *Washington Star* provided that in the event the plan was terminated "[n]o part of the Trust Fund shall ever revert to the company or inure to its benefit prior to satisfaction of all liabilities to employees under the Plan." In 1976 the plan was amended to provide that "no amendment shall divert the Trust Fund as then constituted, nor any part thereof to a purpose other than for the exclusive benefit of employees covered by the Plan or their beneficiaries." 555 F. Supp. at 258. The 1976 amendment also dealt with termination and provided if that occurred, no part of the trust fund could be "returned to the Employer or be used for, or diverted to, purposes other than for the exclusive benefit of employees covered by the Plan or their beneficiaries." *Id.* at 259. The district court upheld the validity of the 1981 amendment that provided for return to the employer of "any assets remaining in the Trust Fund after the full satisfaction of all liabilities of the Plan to participants and their beneficaries. . . ." *Id.*

We conclude that neither *Moyer* nor *Washington Post* compels the result reached by the district court in this case.

III.

Two statements in the district court opinion in the present case are not supported by the record. The court stated that the "exclusivity language" of sections 5.3 and 13.1 of the 1959 agreement must be read in light of the ERISA provisions that mandated it. Since ERISA was enacted in 1974, it clearly mandated nothing with respect to the 1959 agreement. Presumably the district court intended to refer to the requirement of the Internal Revenue Code rather than ERISA. At an earlier place in the opinion, the district court had referred to language "mandated by the Internal Revenue Code," and we assume the later reference to ERISA was a misstatement. More puzzling is the statement, "[t]hose provisions have never prohibited reversion of actuarial error to the employer. . . ." 604 F. Supp. at 892. Perhaps the district court accepted the *Moyer* court's view that the trust estate included only so much

of the funds contributed as were necessary to provide guaranteed benefits and this statement referred to the particular clauses within sections 5.3 and 13.1 that used the words "exclusive benefit." However, this treatment ignores other language in the two sections that clearly does prohibit reversion. It is the other language that the plaintiffs rely upon, and neither the company nor the district court has answered their arguments with respect to that language.

The language referred to by the plaintiffs is not "standard pension language mandated by the Internal Revenue Code." To the contrary, it goes far beyond the requirements of 26 U.S.C. § 401(a):

> *In no event and under no circumstances shall any contributions* to this Trust by the Employer, nor any of the Trust Estate or the income therefrom revert to or be repaid to the Employer.

Section 5.3 (emphasis added). This language treats contributions of the employer and the principal and income of the trust separately and forbids reversion of either.

Unlike any other plan referred to in this record or in the cited cases, this pension plan assured the participating employees that, once contributed, no money paid into the fund could ever be reclaimed by the company. The company responds that the limitation on amendments referred only to diverting the trust estate, and there was no prohibition against an amendment deleting the reference to contributions. This argument overlooks the absolute language of section 5.3: "In no event and under no circumstances. . . ." This language in itself precludes an amendment that would allow money once contributed to be reclaimed. An agreement that provides that an act can occur in no event and under no circumstances cannot be converted into one that permits the act by a series of amendments that first deletes the reference to the prohibition and then adds a provision permitting the forbidden act. Even if a surplus from actuarial error might properly be considered not to be a part of the trust estate, never-

theless, the surplus assets did originate as "contributions" to the trust.

Each case of this kind is controlled by the language of the documents creating the particular plan involved. While the language in *Moyer* limiting the power of the employer to amend the plan was similar to that in the present case, the *Moyer* agreement made no reference to the return of contributions. The limitation on amendments in the *Washington Star* plan did nothing more than prohibit diversion to any purpose other than for the exclusive benefit of participants. See also *Pollock* v. *Castrovinci*, 476 F. Supp. 606, 612 (S.D.N.Y. 1979), *aff'd without opinion*, 622 F.2d 575 (2d Cir. 1980), ("no . . . amendment shall enable [the employer] to recover or divert from the exclusive benefit of the Participants the fund already deposited in the Trust."). None of these cases involved language similar to that found in section 5.3 of the 1959 agreement.

It is reasonable to conclude that limitations on the power to amend that go no further than required by the Internal Revenue Code to guarantee that the trust fund will be preserved for the exclusive benefit of participants were intended to do no more than that. However, the unequivocal prohibition against recapture of any contributions to the fund sets this case apart. It cannot be assumed that the intent was anything other than that expressed in the agreement itself. This conclusion is buttressed by language in a handbook distributed to all employee participants in the International Trust pension plan:

> Funds paid into the trust can never be refunded to the Company and are for the exclusive benefit of the employees under the Trust. . . . It is definitely provided that the funds paid into the Trust are for your exclusive benefit and can never, under any circumstances, revert to the Company.

While the handbook is not a part of the plan agreement and cannot be relied upon to modify or affect any provision of the

plan, it does provide an indication of intent. The "exclusive benefit" guarantee described in the handbook is not limited to the funds in the trust that may be required to pay prescribed benefits. Rather, all funds *paid into* the trust, that is, all contributions, are for the *exclusive benefit* of participants and their beneficiaries. The record before us contains no evidence of a contrary intent.

We do not believe this decision will result in a windfall for the plaintiffs. The plan was designed to provide some financial security for the employees, all of whom lost their jobs when the company ceased operations shortly after terminating the pension plan. On the other hand, permitting the company to recapture its contributions to the fund might well result in a windfall. The company was entitled to deduct its contributions to the pension trust for income tax purposes. Under the present law, there appears to be no income tax on the reversion of pension fund assets even though the payments which created the surplus are deductible. See *Mertens Law of Federal Income Taxation*, § 25B.13, of the January 1986 Cum. Supp., p. 36. (President Reagan's proposed tax reform would impose a 10% excise tax on plan funds reverting to the employer for plan terminations after January 1, 1986.).

The judgment of the district court is reversed and the case is remanded for further proceedings. The district court will fashion an equitable allocation of the excess funds among the participants and their beneficiaries. The plaintiffs will recover their costs on appeal.

WELLFORD, Circuit Judge, dissenting. The issue in this case is a troubling one. Appellee, the employer contributor to an ERISA plan, seeks a return of its excess contributions to the plan after *full satisfaction* of all amounts due the employee participants in the plan. The latter, appellants in this case, seek the excess remaining in the plan representing contributions due to an actuarial miscalculation. The employer provided in the original plan, before amendment, that in no event would contributions revert to it. If successful, the employees would receive, in effect, a windfall toward

which they made no payment and had no reasonable basis for expectation.

I find three cases affirmed without opinion by other circuits to be persuasive authority for the employer's position, indicating that an affirmance of the district court's decision would be appropriate.

The first case, *In re C. D. Moyer Co. Trust Fund*, 441 F. Supp. 1128 (E.D. Pa. 1977), *aff'd without opinion*, 582 F.2d 1273 (3d Cir. 1978)[1] also involved an employer funded pension plan providing for fixed participant employee benefits. The plan, not a part of a collective bargaining agreement, permitted amendments but was limited to make it "*impossible* . . . for any of the trust corpus or income to be diverted to or revert to either of the employers or to be used for any purpose other than the *exclusive benefit* of the participants. . . ." 441 F. Supp. at 1131 (emphasis added). The employer, despite this language, amended the plan when, upon proposed termination, it was learned that there was a substantial surplus in the plan above and beyond the fixed benefits provided for all participants. The amendment provided for refund to the contributing employer of the surplus assets due to "erroneous actuarial computations," *id.*, after full satisfaction to eligible employees. The court held that since it was not intended that there be excessive contributions due to actuarial miscomputation, a "mistake of fact," the employer's action was appropriate, and it could recover its mistaken excessive payments or contributions. Reference was made to Revenue Ruling 77-200 which permitted such employer actions despite both ERISA and I.R.C. "general prohibitions against diversion of assets" to employers under qualified plans. The court noted that this would not "penalize" a fully funding employer

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[1] The continuing vitality of *Moyer* is somewhat questionable in light of *Delgrosso* v. *Spang & Co.*, 769 F.2d 928 (3d Cir. 1985). The latter case involved a collectively bargained for pension plan and contractually required contribution, and an amendment providing for reversion without any such amendment authority in the employer. The Third Circuit, however, itself distinguished the factual situation in *Delgrosso* from *Moyer*.

nor provide a "windfall" to employees "as a result of miscalculation." *Id.* at 1133.

The second case, *Pollock* v. *Castrovinci*, 476 F. Supp. 606 (S.D.N.Y. 1979), *aff'd without opinion*, 622 F.2d 575 (2d Cir. 1980), involved an ERISA pension plan in which the employer made all contributions with a fixed formula for employee benefits. The plan did not provide expressly for employer recapture of excess contributions made beyond the amount necessary to provide for full specified employee benefits, and it contained the following provision:

> The employer shall have power to amend the terms of this Plan in any way provided that no such amendment shall enable it to recover or divert from the *exclusive benefit of the Participants* the fund already deposited. . . .

476 F. Supp. at 612 (emphasis added). The employer, nevertheless, amended the plan to provide that excess contributions would be distributed back to the employer. The court held that this did not violate ERISA principles, and like *Moyer*, was in accord with equitable principles under the circumstances. It cited another similar case allowing a retroactive amendment for reversion of excess plan assets to a contributing employer, *Audio Fidelity Corp.* v. *Pension Benefit Guaranty Corp.*, No. 78-0623-12 (E.D. Va. Dec. 12, 1978).[2]

The third case, *Washington-Baltimore Newspaper Guild Local 35* v. *Washington Star Co.*, 555 F. Supp. 257 (D.D.C. 1983), *aff'd without opinion*, 729 F.2d 863 (D.C. Cir. 1984) involved yet another similar factual situation under ERISA. The employer amended the plan to provide for reversion of excess pension plan trust assets to the employer after full satisfaction of plan benefits to employee participants despite the following language:

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[2] *Audio Fidelity* was reversed by the Fourth Circuit at 624 F.2d 513 (1980). The latter decision was distinguished in *Washington-Baltimore Newspaper Guild* v. *Washington Star Co.*, 555 F. Supp. 257, 262.

> . . . no amendment shall divert the Trust Fund, as then constituted, nor any part thereof, to a purpose other than for the *exclusive benefit* of employees covered by the plan. . . .

555 F. Supp. at 258 (emphasis added.) *Washington Star Co.* cited with approval *Pollock* which allowed reversion to the employer under like circumstances in accord with "the common law of trusts," I.R.C., and "policies underlying the enactment of ERISA." 555 F. Supp. at 260. Again, it was emphasized that non-contributing employees had no right to the extra benefits in the situation where the employees had received the full specified benefits; more than this would constitute a "windfall." 555 F. Supp. at 265.

I am therefore disposed under the authority of these cases to affirm the district court decision, particularly with regard to the language set out in Section 13.1 of the Plan. If the language in Section 5.3 were construed to preclude the amendment and subsequent reversion to the employer, I would hold that the excess contributions should, nevertheless, not go to the employees as an undeserved windfall due to an actuarial miscalculation. Rather, I would hold that the excess contributions should be distributed to the Pension Benefit Guaranty Corporation which is charged with enforcing the responsibility under ERISA of providing employees generally the vested and/or specified benefits called for under employer pension plans.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

C-1-84-45

JAMES BRYANT, et al.,

Plaintiffs,

v.

INTERNATIONAL FRUIT PRODUCTS COMPANY, INC.,

Defendant.

ORDER

(Filed January 22, 1985)

This matter is before the Court on defendant's Motion to Dismiss (doc. no. 5) and plaintiffs' Motion for a Partial Summary Judgment (doc. no. 30). The parties have filed extensive memoranda with supporting affidavits and documentation. Pursuant to the terms of Fed. R. Civ. P. 12(b)(6), the Court will consider defendant's motion as one for summary judgment, and dispose of it as provided in Fed. R. Civ. P. 56.

The material facts in this matter are few and are not seriously in dispute. Defendant employer maintained a defined benefit pension plan (Plan) for its employees from 1944 through 1982.[1] The Plan was funded solely by employer contributions. Defendant terminated the Plan on July 1, 1982, and disbursed approximately $61,000 in accrued retirement benefits to the Plan participants. A $138,997 surplus remained. There is no dispute that the plaintiffs, who represent 15 of the 60 Plan participants, have received all the defined benefits they are entitled to under the Plan. This issue instead

[1] For a definition of "defined benefit plan," see 29 U.S.C. § 1002(35) (1982).

is whether they are also entitled to a share of the surplus or whether that money reverts to the defendant.

Plaintiffs base their claim for the surplus on the following language contained in a 1959 version of the Plan.

> 5.3 In no event and under no circumstances shall any contributions to this Trust by the Employer, nor any of the Trust Estate or the income therefrom, revert to or be repaid to the Employer; and all amounts paid by the Employer to the Trustees shall be used and applied for the sole and exclusive benefit of the participants under this Trust or their beneficiaries or estates.
>
> 13.1 The Employer expressly reserves the right to amend this Trust from time to time, either on the motion of the Trustees, or upon the Employer's own initiative; provided, however, that no such amendment shall cause or permit any part of the Trust Estate to revert or be repaid to the employer or be diverted to any purpose other than the exclusive benefit of the participants or their beneficiaries or estates.

In 1976, pursuant to the above section 13.1, defendant revised the Plan to comply with the newly enacted Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001 *et seq.* That revision replaced sections 5.3 and 13.1 with sections 8.2 and 11.1, respectively.

> 8.2 It shall be impossible at any time prior to the complete satisfaction of all liabilities with respect to Members and their Beneficiaries under this Plan for any part of the Trust Fund to be used for, or diverted to, purposes other than the exclusive benefit of the Members and their Beneficiaries.
>
> 11.1 The Employer shall have the right to alter or amend this Plan at any time in whole or in part, provided that no amendment shall arise or permit any part of the Trust Fund to be used for or diverted to any purpose other than the exclusive benefit of the Members or

> their Beneficiaries, and provided further that no amendment shall serve to deprive any Member or Beneficiary of a deceased Member of any of the values to which he is entitled under this Plan with respect to contributions previously made.

On May 25, 1982, defendant's Board of Directors amended the termination section, section 11.2, to include the following language: "After fulfillment of all obligations provided for in this Section 11.2, any portion of the Trust Fund remaining as a result of actuarial error shall be returned to the Employer." (Doc. no. 5, Exhibit B). In the same action, defendant's Board ordered termination of the Plan effective July 1, 1982.

The termination of employee benefit plans is governed by ERISA. *See UAW* v. *Dyneer Corp.*, 747 F.2d 335 (6th Cir. 1984). ERISA's general rule on plan termination is that "the assets of a plan shall never inure to the benefit of any employer." 29 U.S.C. § 1103(c)(1) (1982). One exception to the rule permits reversion of residual assets to the employer if the following three conditions are met: (a) all liabilities of the plan to participants and their beneficiaries have been satisfied, (b) the distribution does not contravene any provision of the law, and (c) the plan provides for such a distribution in these circumstances. *Id.* § 1344(d)(1)(A)-(C). The only condition that plaintiffs allege has not been met by defendant is (c).

Defendant argues that it satisfied the third condition above when, on May 25, 1982, it amended section 11.2 of the Plan to allow the recapture of surplus assets of the trust fund attributable to actuarial error. Plaintiffs' position is that the 1982 amendment violated sections 5.3 and 13.1 of the 1959 version of the Plan.

In deciding this issue, the Court is faced with the task of interpreting the language of the Plan. The plain language of the two sections relied upon by plaintiffs clearly prohibits the defendant from sharing in any of the assets of the Plan. An explanatory booklet distributed to the employees essentially parrots that language. (Doc. no. 39A, Exhibit E). Yet, until May of 1982, the Plan had no provision for dealing with any post-

termination surplus. To resolve this ambiguity, defendant offers the explanation that the "exclusivity" language of sections 5.3, 13.1, and later sections 8.2 and 11.1, is standard pension language mandated by the Internal Revenue Code. As evidence of that fact, defendant points to section 13.3 of the 1959 version that states, "[t]he Employer has created this Trust with the intent that it qualify within the terms and conditions of Section 401(a). . . ." (Doc. no. 5, Exhibit B). One of the conditions imposed by section 401(a) is that

> "it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be . . . used for, or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries. . . ."

26 U.S.C. § 401(a)(2) (1982). An explanatory regulation states that

> "[t]he intent and purpose of section 401(a)(2) of the phrase 'prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust' is to permit the employer to reserve the right to recover at the termination of the trust, and only at such termination, any balance remaining in the trust which is due to erroneous actuarial computations during the previous life of the trust."

Treas. Reg. § 1.401-2(b)(1).

Defendant's explanation of the "exclusivity" language of the 1959 version of the Plan is supported by two cases in which it was held that almost identical exclusivity language did not bar an amendment allowing the reversion of actuarial error to the employer. *See In Re C. D. Moyer Co. Pension Trust*, 441 F. Supp. 1128 (E.D. Pa. 1977), *aff'd without op.*, 582 F.2d 1273 (3d Cir. 1978); *Washington-Baltimore Newspaper Guild* v. *Washington Star Co.*, 555 F. Supp. 257 (D. D.C. 1983), *aff'd without op.*, 729 F.2d 863 (D.C. Cir.

1984). *See also Pollock* v. *Castrovinci*, 475 F. Supp. 606 (S.D. N.Y. 1979), *aff'd without op.*, 622 F.2d 575 (2d Cir. 1980). *Washington-Baltimore Newspaper* and *C. D. Moyer* have been cited with approval by the United States Court of Appeals for the Sixth Circuit. *UAW* v. *Dyneer Corp.*, 747 F.2d 335, 337 (6th Cir. 1984).

Plaintiffs cite three cases in support of their position. Such cases are readily distinguishable from the matter at hand and from both *Washington-Baltimore* and *C. D. Moyer*. In two of the cases, the employer's original plan included a provision for distribution of post-termination surplus to the participants. *Audio Fidelity Corp.* v. *Pension Benefit Guaranty Corp.*, 624 F.2d 513 (4th Cir. 1980); *Delgrosso* v. *Spang & Co.*, 586 F. Supp. 177 (W.D. Pa. 1983). In the third case, the employee benefit plan contained no provision for reversion of surplus as required by 26 U.S.C. § 1344(d)(1)(C). *Kruzynski* v. *Richard Bros. Punch Co.*, 211 Pens. Rep. (BNA) D-8 (E.D. Mich. 1978). These bars to reversion are not present here.

The exclusivity language of the sections relied upon by plaintiffs must be read in light of the ERISA provisions that mandated it. Those provisions have never prohibited reversion of actuarial error to the employer, nor do they in this case. The defendant here properly amended its Plan to provide for reversion and that amendment brought it in compliance with the requirements of 29 U.S.C. § 1344(a). The Court therefore holds that the Plan's past and present exclusivity language does not bar the reversion of Plan surplus to the defendant.

Plaintiffs have two more grounds to support their right to the Plan's surplus. The first is that the surplus does not qualify as actuarial error, but is instead the result of intentional overfunding. There are two replies to that argument. First, plaintiffs have provided no evidence of intentional overfunding sufficient under Fed. R. Civ. P. 56(e) to support this contention. Second, even if such evidence were available it would not be controlling since the words "actuarial error" have been defined by the Internal Revenue Service in a way that includes even intentional overfunding.

Actuarial error occurs "when fixed and contingent liabilities are discharged through the purchase of a contract or contracts from an insurance company which provides the benefits with respect to individuals for whom the liabilities are determined, *the remaining assets may be considered surplus arising from actuarial error. . . .*" (emphasis added). Rev. Rul. 83-52, 1983-1 C.B. 87. *See also* Treas. Reg. § 1.401-2(b)(1). This definition has been approved by the Sixth Circuit. *UAW* v. *Dyneer Corp.*, 747 F.2d 335, 337 (6th Cir. 1984).

Plaintiffs' final ground for recovery is a request for equitable relief based on state law theories of unjust enrichment, breach of fiduciary duty, and promissory estoppel. The Court declines to provide such drastic relief for the following reasons. First, ERISA contains a provision expressly preempting "any and all state laws, insofar as they now or hereafter relate to any employee benefit plan." 29 U.S.C § 1144(a) (1982). Without deciding whether this provision bars all equitable relief in ERISA cases, it is enough to discourage the use of state equitable remedies in all but the most compelling instances. Second, the plaintiffs have already received all the benefits they are entitled to under the Plan. Extraordinary equitable powers should not be exercised to provide plaintiffs with a windfall. To hold otherwise would undermine the policies behind the enactment of ERISA. As another court noted after allowing the reversion of actuarial error to an employer:

> This result is consistent with the policies underlying the enactment of ERISA. Employers will continue to fund their plans under ERISA guidelines, but will not be penalized for overfunding in "an abundance of caution" or as a result of a miscalculation on the part of an actuary. Thus, employees will continue to be protected to the extent of their specific benefits, but will not receive any windfalls due to the employer's mistake in predicting the amount necessary to keep the Plan on sound financial basis.

In Re C. D. Moyer Co. Trust Fund, 441 F. Supp. 1128, 1132-33 (E.D. Pa. 1977).

Defendant's Motion for Summary Judgment (doc. no. 5) is GRANTED. Plaintiffs' Motion for Partial Summary Judgment (doc. no. 30) is DENIED.

IT IS SO ORDERED.

/s/ CARL B. RUBIN, Chief Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

C-1-84-45

JAMES BRYANT, et al.,
Plaintiffs,

v.

INTERNATIONAL FRUIT PRODUCTS COMPANY, INC.,
Defendant.

ORDER
(Filed March 4, 1985)

This matter is before the Court on Motions for Summary Judgment filed by defendants Irwin Ungar and Marie Specker Dopp. (Doc. nos. 51, 52). For the reasons set forth in the Court's January 22, 1985, Order (doc. no. 53), the Motions are GRANTED.

IT IS SO ORDERED.

/s/ CARL B. RUBIN, Chief Judge
United States District Court

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 85-3183/3229

JAMES BRYANT, et al.,
Plaintiffs-Appellants,

v.

INTERNATIONAL FRUIT PRODUCTS COMPANY, INC., et al.,
Defendants-Appellees.

Before: LIVELY, Chief Judge; and MERRITT and WELLFORD, Circuit Judges.

JUDGMENT
(Filed June 12, 1986)

ON APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby reversed and the case is remanded for further proceedings consistent with this opinion.

It is further ordered that Plaintiffs-Appellants recover from Defendants-Appellees the costs on appeal, as itemized below, and that execution therefor issue out of said District Court, if necessary.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN, Clerk

A True Copy.

Attest:
/s/ GARY McCARTHY, Deputy Clerk

Issued as Mandate: August 25, 1986

COSTS: (Awarded to appellants)

Filing fee	$ 70.00
Printing	$175.33
Total	$245.33

SEE ALSO THE COURT'S ORDER OF July 14, 1986 FOR INSTRUCTIONS CONCERNING INTEREST.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 85-3183
No. 85-3229

JAMES BRYANT, et al.,
Plaintiffs-Appellants,

v.

INTERNATIONAL FRUIT PRODUCTS COMPANY, INC., et al.,
Defendants-Appellees.

ORDER
(Filed July 10, 1986)

BEFORE: LIVELY, Chief Judge; MERRITT and WELLFORD, Circuit Judges.

Upon receipt and consideration of the petition for rehearing filed herein by the defendants-appellees, the court concludes that it did not overlook the fact that the company amended the pension plan in 1976. To the contrary, this amendment was discussed at page three of the opinion. Further, the opinion did not hold that the appellee had not paid income tax on the recovered surplus from the pension trust. The opinion merely stated that there was no apparent requirement under the Internal Revenue Code for reporting this recovery as income and cited a proposed change in the Code to make certain that such recovered funds are taxed.

The petition for rehearing is denied.

Judge Wellford dissents.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

APPENDIX B

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29 U.S.C. § 1103(c)(1)

§ 1103. Establishment of trust

* * *

(c) Assets of plan not to inure to benefit of employer; allowable purposes of holding plan assets

(1) Except as provided in paragraph (2), (3), or (4) or subsection (d) of this section, or under sections 1342 and 1344 of this title (relating to termination of insured plans), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their beneficiaries and defraying reasonable expenses of administering the plan.

* * *

29 U.S.C. § 1344(d)(1)

§ 1344. Allocation of assets

* * *

(d) Distribution of residual assets; remaining assets

(1) Any residual assets of a single-employer plan may be distributed to the employer if —

(A) all liabilities of the plan to participants and their beneficiaries have been satisfied,

(B) the distribution does not contravene any provision of law, and

(C) the plan provides for such a distribution in these circumstances.

* * *

26 U.S.C. § 401(a)(2)

§ 401. Qualified pension, profit-sharing, and stock bonus plans.

(a) Requirements for qualification. — A trust created or organized in the United States and forming part of a stock bonus, pension, or profit-sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section —

* * *

(2) if under the trust instument it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries (but this paragraph shall not be construed, in the case of a multiemployer plan, to prohibit the return of a contribution within 6 months after the plan administrator determines that the contribution was made by a mistake of fact or law ([1] other than a mistake relating to whether the plan is described in section 401(a) or the trust which is part of such plan is exempt from taxation under section 501(a), or the return of any withdrawal liability payment determined to be an overpayment within 6 months of such determination);

* * *

Treas. Reg. 1.401-2(b)(1)

§ 1.401-2 Impossibility of diversion under the trust instrument.

* * *

(b) Meaning of "*liabilities*".

(1) The intent and purpose in section 401(a)(2) of the phrase "prior to the satisfaction of all liabilities with

respect to employees and their beneficiaries under the trust" is to permit the employer to reserve the right to recover at the termination of the trust, and only at such termination, any balance remaining in the trust which is due to erroneous actuarial computations during the previous life of the trust. A balance due to an "erroneous actuarial computation" is the surplus arising because actual requirements differ from the expected requirements even though the latter were based upon previous actuarial valuations of liabilities or determinations of costs of providing pension benefits under the plan and were made by a person competent to make such determinations in accordance with reasonable assumptions as to mortality, interest, etc., and correct procedures relating to the method of funding. For example, a trust has accumulated assets of $1,000,000 at the time of liquidation, determined by acceptable actuarial procedures using reasonable assumptions as to interest, mortality, etc., as being necessary to provide the benefits in accordance with the provisions of the plan. Upon such liquidation it is found that $950,000 will satisfy all of the liabilities under the plan. The surplus of $50,000 arises, therefore, because of the difference between the amounts actuarially determined and the amounts actually required to satisfy the liabilities. This $50,000, therefore, is the amount which may be returned to the employer as the result of an erroneouos actuarial computation. If, however, the surplus of $50,000 had been accumulated as a result of a change in the benefit provisions or in the eligibility requirements of the plan, the $50,000 could not revert to the employer because such surplus would not be the result of an erroneous actuarial computation.

* * *

(2)

Supreme Court, U.S.
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No. 86-555

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1986

INTERNATIONAL FRUIT PRODUCTS COMPANY, INC. et al.,

Petitioners

vs.

JAMES BRYANT et al.,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Did the Court correctly interpret the pension plan as prohibiting any amendment permitting the employer to recapture assets of the plan?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 793 F.2d 118 (6th Cir. 1986) and the opinion of the District Court is reported at 640 F. Supp 890 (S.D.Ohio 1985).

FEDERAL STATUTE INVOLVED

The statute involved in this case is the Employee Retirement Income Security Act of 1974 (ERISA) as amended 29 U.S.C. Sections 1001 et seq.

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS CORRECTLY INTERPRETED THE INTENT OF THE PENSION PLAN TO PROHIBIT THE EMPLOYER FROM RECAPTURING TRUST ASSETS

ERISA prohibits distribution of the residual assets of pension plans unless "The plan provides for such distribution in these circumstances." ERISA Section 4044(d)(1)(C) 29 U.S.C. 1344(d)(1)(C). The sole issue in this case was the intent of the pension plan. Did the plan prohibit the employer from recapturing the surplus?

This is not a case of statutory construction.[1] It boils down to an issue of

---

[1] Petitioner is 100% wrong to suggest that ERISA favors reversion of the surplus to the employer in the face of a plan forbidding such reversion. There is nothing in ERISA's language or history to support such an argument. The authorization of a reversion under the limited circumstances contained in Section 4044(d)(1)(C) is an exception to the general "exclusive benefit rule" set forth in Section 403(c)(1). It is beyond dispute that such exceptions should be read narrowly, Kross vs. Western Electric Co., 701 F.2d 1238 (7th Cir. 1983).

plan interpretation What was the intent and purpose of the disputed language set forth in Sections 5.3 and 13.1 of the 1959 plan:

> Section 5.3 "In no event and under no circumstances shall any contributions to this trust...be repaid to the employer"
>
> Section 13.1 "No amendment shall cause or permit any part of the trust estate...to be repaid to the employer"

The Sixth Circuit Court of Appeals was correct in holding that this prohibition against recapture was "absolute" and "unequivocal" and that the intent was, as expressed within the four corners of the plan.

Words must be given their plain, ordinary, and popular meaning in the absence of evidence indicating a different meaning. Corbin on Contracts, Vol. 3 pgs. 106-107. The employer produced no extrinsic evidence of any intent contrary to the crystal clear prohibitions of the plan.

The Plaintiff did produce extrinsic evidence. The employee handbook stated at pg. 8:

> "Funds paid into the trust can never be refunded to the Company..can never under any circumstances, revert to the company."

The Court noted that the handbook's language was an indication of intent that the guarantee "was not limited to the funds in the trust that may be required to pay prescribed benefits." The Court's interpretation was consistent with the reasonable expectations of the employees, or any other reader of the handbook and plan. The employer's actuary expert witness, hired to handle the termination, supported Plaintiffs, testifying as follows concerning the disputed Section 13.1:

> "If that provision was in effect then I am sure that the money would have been distributed to the people, rather than going back to the company...
> (Crist deposition pg. 27)

Other well settled rules favored plaintiffs. It is hornbook pension plan doctrine that "...Where the employer established the terms of a pension plan, those terms should be construed in favor of the employee", Hoefel v. Atlas Tack Corp., 581 F.2d 1 84 LC 10,771 (1st Cir. 1978). If there were any ambiguity, the Court should adopt the meaning less favorable to the employer draftsman who selected the words. 3 Corbin on Contracts, Chapter 24 Section 559 at 262 (1950).

Petitioners argue that the Court should have ignored the strong language of Section 5.3 and focused solely upon Section 13.1. Nonsense. First of all Section 5.3 by its words, "In no event and under no circumstances..." established restrictions on any future amendments and was itself an "anti-amendment section".[2]

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[2] The Sixth Circuit noted:
"This language in itself precludes an amendment that would allow money once contributed to be reclaimed" (p.8a Appendix A

Secondly, the court had every right and duty to analyze other terms of the plan in order to find the intent of Section 13.1, deemed the anti-amendment section. As stated by the Court:

> "An agreement that provides that an act can occur in no event and under no circumstances cannot be converted into one that permits the act by a series of amendments that deletes the reference to the prohibition and then adds a provision permitting the forbidden act."

(pg. 8a, Appendix A Petitioner's brief)

In sum, there was not the slightest ambiguity in the anti-reversion, anti-amendment features of the plan.

II. THERE IS NO CONFLICT BETWEEN THE CIRCUITS

This was a garden variety contract- type pension plan interpretation case. As the Sixth Circuit opinion noted:

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to Petitioners Brief).

> "Each case of this kind is controlled by the language of the documents creating the particular plan involved."

(p.9 of Appendix Petitioners Brief)

There are many cases of this kind. In each, the courts undertake painstaking study, and analysis of all the facts and circumstances of the particular plan involved. In some cases the courts rule in favor of the employees, and prohibit recapture Delgrosso v. Spang Co., 769 F. 2d 928 (3rd Cir. 1985), Audio Fidelity v. PBGC, 624 F2d 513 (4th Cir. 1980). Kruzynski v. Richard Brothers Punch Co., _____F.Supp.___ (ED of Mich 1978) 211 BPR/D-8). The employer was successful in the Moyer, Washington Star and Pollock cases cited by Petitioner.[3] The result was different from the case at bar. But there is no conflict of

---

[3] C. D. Moyer Company Pension Trust, 441 F. Supp. 1128 (E.D. Pa. 1977), aff'd without opinion, 582 F.2d 1283 (3d Cir. 1978); Pollock v. Castrovinci, 476 F. Supp. 606 (S.D.N.Y. 1979), aff'd without opinion, 622 F.2d 575 (2d Cir. 1980); Washington-Baltimore Newspaper Guild vs. Washington Star Co., 555 F. Supp. 257 (D.D.C. 1983), aff'd without opinion, 729 F.2d 863 (D.C. Cir. 1984).

legal principles only a difference in facts.

None of the three circuits have spoken concerning the issues raised by Petitioners. All three of the cited district court cases were affirmed without opinion. It can hardly be said that the Circuits have set forth reasoned articulated views on the subject when they have failed to write opinions.

Furthermore as to Moyer, the dissent correctly points out that "the continuing vitality of Moyer is somewhat questionable in light of Delgrosso v. Spang & Co., 769 F2d 928 (3rd Cir. 1985)."

In all events, the plans in Washington Star and Pollock did not contain specific prohibition against recapture language as herein but only broad more typical "exclusive benefit" language.[4]

---

[4] The prohibition herein was that no assets shall "revert to or be repaid to the employer." (5.3) No amendment shall...permit any part...to revert to or be repaid to the employer." (13.1) No such express and specific prohibition appears in the Pollack or Washington Star plans.

Also, in Moyer and Pollock, the district court relied heavily on plan provisions absent in the case at bar (the "scheme of priorities in the event of...termination" Moyer; other "various provisions...dealing with termination" Pollock).

None of the plans in the three cited cases contained extrinsic evidence of intent as set forth in the employee handbook. None contained the powerful language of Section 5.3:

> "In no event and under no circumstances shall any contributions...revert to or be repaid to the employer."

As the Sixth Circuit stated:

> "...the unequivocal prohibition against recapture of any contributions to the fund set this case apart."

In sum, the district courts in Moyer, Pollock, and Washington Star, were interpreting different plans, containing different language and provisions exhibiting

differing intent. These cases cite no rule of law contrary to the principles followed by the Sixth Circuit.

III. THIS CASE DOES NOT INVOLVE ANY IMPORTANT QUESTION OF FEDERAL LAW

This is not a case interpreting any federal statute. There is no debate about the meaning of any words of ERISA. All agree that ERISA forbids the recapture by the employer of residual assets of pension plan unless the listed requirements of Section 4044(d)(1) are met.

The sole issue in this case is one of pension plan interpretation. Neither ERISA, nor federal common law, or state law contains any specific public policy requiring the Courts to disregard the plain unambiguous meaning of the words of a plan.

The employer makes non-legal arguments concerning the alleged unfairness of the result. The employees were unskilled union

workers. Pension contributions were part of compensation for their services. Plaintiffs expected to work until retirement. Instead they were let go at a much earlier date, suddenly, without warning, or severance pay. They were not paid the benefits they expected at retirement but only the actuarial equivalent. It would be unfair to give a windfall to the employer who never planned on recovering the contributions. In all events, there is no federal policy against employees receiving an extra benefit upon termination.

We trust that petitioner's "scare tactics" will be ignored. An employer's duty to make proper contributions to a pension fund according to normal actuarial, legal, and accounting requirements is not changed one iota by this case. An employer is still free to write or amend his plan as it deems fit, so long as there is no breach of the terms of the plan.

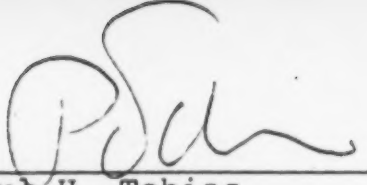
In sum, whether the employees received a "windfall" and whether employers are unhappy with the decision are not important issues of federal law.

CONCLUSION

This case is not appropriate for certiorari. There is no issue of statutory interpretation. There is no rule of law at stake. The principle issue was whether there should be a strict interpretation of the special unique restrictions in this particular pension plan. There is no conflict of legal principles among the circuits. This was a question of intent - appropriate for the lower federal courts to resolve on a case by case basis, based on all the facts and circumstances of each particular case.

The petition should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing document have been sent to Harold S. Freeman, Esq., Dinsmore & Shohl, 2100 Fountain Square Plaza, 511 Walnut St., Cincinnati, Ohio 45202, Counsel for Petitioners on this 30 day of October, 1986.

Paul H. Tobias